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IN THE

Supreme Court of the United States

October Term, 1950.

No. 185.

BAKER-CAMMACK HOSIERY MILLS, INC., and
BAKER-MEBANE HOSIERY MILLS, INC., *Petitioners,*

v.

THE DAVIS COMPANY, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the District Court (R.V.I., 42-56) is reported at 86 F. Supp. 180. The opinion of the United States Court of Appeals for the Fourth Circuit (R.V.III, 28-52) is reported at 181 F. (2d) 550.

JURISDICTION.

The jurisdictional requisites are set forth in the Petition.

QUESTIONS PRESENTED.

1. Whether Respondent's licensing practices constitute a misuse of the patents in suit, rendering them unenforceable.

2. Whether the inventions of the patents in suit are patentable.

3. Whether this court should exercise its supervisory authority to modify decrees including recitals that the identified members of the Hosiery Investigating Committee, who participated in and openly controlled the defense of the suit including the appeal and the petition to this court, will be bound by the judgment on issues other than that of infringement.

STATUTES INVOLVED.

Pertinent statutory provisions are cited in the Petition.

STATEMENT.

This is a patent infringement suit. There is no conflict of decision as to the validity of the patents in suit or as to the alleged misuse of patents by Respondent. The statements in the Petition and brief in support thereof suggesting a dispute of *law* on these issues are premised upon Petitioners' assertions of *facts,* which assertions are not established in the record and were rejected by both the trial court and the Court of Appeals.

The allegation that the trial court and the Court of Appeals exceeded their jurisdiction is bottomed upon a misconstruction of the decrees and a misapplication of the controlling law.

POINT I.

The Decision of the Court of Appeals that the Respondent Had Not Misused Its Patents Was Correct and Not in Conflict With Any Applicable Decision of this Court.

Respondent, a patent licensing company, owns fifteen patents relating to plain knit automatic elastic top hosiery (R. V. III, 71).

In 1946 Respondent offered to the hosiery industry one uniform non-exclusive license under all the fifteen patents (R. V. II, 259).

Licensees were given the privilege to make, use and sell hosiery embodying or made in accordance with *one or more* of the inventions.

The royalty was two cents per dozen pairs on all hosiery embodying or made in accordance with the invention of *one or more* of the patents. The term of the license was from September 1, 1946 to the end of the term of the last expiring of the licensed patents, i.e. March 14, 1961. The license was silent as to payment of royalty on hosiery covered only by claims of an earlier expiring patent.

Of this license the Court of Appeals said:

> "The license offered by the plaintiff in 1946 contained no restrictions as to the quantity of goods to be produced, or the price to be charged, or the territory in which they might be sold by the licensee. There were no tying clauses of any character, no pyramiding of royalties, and no requirement that the inventions must be used. The license was specifically confined to the type of manufacture of plain circular knit hosiery, embodying one or more of the inventions, expressly excepting, however, the right to make the character of goods reserved to the Interwoven Company." (R. V. III, 68-69)

Contrary to the implications of the petition and supporting brief, the license offered by Respondent in 1946 has not been condemned by any court. It is a more liberal license

than the one held by this court not to constitute a misuse of patents in *Automatic Radio Mfg. Co.* v. *Hazeltine Research, Inc.*, 70 S. Ct. 894, October Term, 1949, No. 455, decided June 5, 1950.

Following this court's decision in *United States* v. *Paramount Pictures*, 334 U. S. 131, Respondent, out of an abundance of caution, in December 1948 made a further offer to license the hosiery industry to make certain defined popular types of elastic top hosiery covered by various of its complemental patents (R. V. II, 266-268). Respondent also offered to grant uniform licenses at reasonable royalties to all comers for any other type hosiery comprehended by the claims of United States patents owned by it (R. V. II, 268).

The licenses offered in 1948 eliminated admissions of validity and were made to terminate on the expiration date of the first expiring of the specifically licensed complemental patents (R. V. II, 271).

The Respondent's offer of new licenses in December 1948 was made in good faith and as the Court of Appeals sets out:

> ". . . it was conceded by plaintiff's attorney in the argument of the case that the plaintiff's claim for damages for infringement must be confined to the period subsequent to December 24, 1948, when the last offer was made, and restrictions upon the license offered in 1946 were withdrawn." (R. V. III, 71)

In view of this concession the Court of Appeals said:

> "We shall discuss this aspect of the case in connection with the latest offer of the plaintiff to license hosiery manufacturers . . ." (R. V. III, 71)

The Court of Appeals recognized that the issue of misuse based on the original license was rendered moot by Respondent's 1948 offer of new license. It therefore considered the case realistically under the newly offered licenses which it held to be a proper use of the patents (R. V. III, 73). This holding is in accord with the controlling deci-

sions of this court. *United States* v. *United Shoe Mach. Co.*, 247 U. S. 32; *United States* v. *Winslow*, 227 U. S. 202; *Standard Oil Co.* v. *United States*, 283 U. S. 163.

Inasmuch as all licensing practices followed by Respondent uniformly extend the privilege of using the patents for a reasonable royalty without restriction or tying clause of any name or nature, they fully comply with the standards set by this court even for adjudicated antitrust law violators. *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, 408; *United States v. National Lead Co.*, 332 U. S. 319.

This court has, however, left no uncertainty as to the propriety of Respondent's licensing practices in its decision in *Automatic Radio Mfg. Co.* v. *Hazeltine Research, Inc.*, *supra*. The disposition of this issue by the Court of Appeals was in strict conformity with the rulings of this court.

Petitioners repeatedly stress the pendency of a Government civil suit against Respondent in the United States District Court for the Southern District of New York in which the *complaint* alleges antitrust law violation. This civil suit was filed on December 28, 1949. The instant case was heard in the Court of Appeals on January 10, 1950. The civil suit has not gone to trial, yet Petitioners seek to give the *mere allegations* of the complaint therein the force of a judgment. In the instant case the courts below, after full presentation by Petitioners of the asserted defenses of patent misuse and antitrust law violation, found these defenses to be unsupported by the facts and without merit under the controlling decisions of this court (R. V. III, 73, et seq.). The Court of Appeals did so with full knowledge of the pending civil action (R. V. III, 79). There is no conflict of decision on any issue in this cause.

POINT II.

The Court of Appeals and the District Court Properly Held the Patents in Suit to be Valid.

The Petitioners raise no important legal questions with respect to the validity of the patents in suit. There is no conflict of decision with respect to them.

The Petitioners' argument for invalidity (pp. 10-11) is based on the postulate that the patents in suit "relate to an old art" and to the use of "Lastex", a yarn that is the subject of an expired patent to Adamson. The District Court (R. V. I, 36) and the Court of Appeals (R. V. III, 40) both found against Petitioners *on the facts.* Both courts found that "Lastex" as described by Adamson was not suitable for practicing the inventions of the patents in suit and that those inventions constituted a marked contribution to the hosiery art that led to the development of a "Lastex" yarn effective for the practice of the inventions (R. V. I, 36). The record abundantly supports the findings (R. V. II, 46, 91-92, 103, 126).

The validity of the patents in suit was properly found by both courts below. The legal principles involved are well established and not in dispute. Petitioners err on the facts. This court does not normally disturb concurrent findings of fact. *Goodyear Tire & Rubber Co.* v. *Ray-O-Vac Co.,* 321 U. S. 275; *Graver Tank & Mfg. Co., Inc., et al.* v. *The Linde Air Products Co.,* 336 U. S. 271; *Faulkner* v. *Gibbs,* 70 S. Ct. 25.

POINT III.

The Rulings of the Court Below Are in Conformity With Established Law and Call for No Exercise of this Court's Power of Supervision.

The Petition suggests that this court should exercise its power of supervision in the matter of the decrees of the District Court as approved by the Court of Appeals. The

District Court made the following finding of fact:

> I. The "Hosiery Investigating Committee" was in charge of the defense of this suit. It is an organization having as its members the 167 hosiery mills listed in plaintiff's Exhibit P-9 and possibly others. It was organized for the purpose of investigating the validity of the patents in this suit and defending litigation brought to enforce these patents (Plaintiff's Exhibit 3). It employed counsel to conduct the defense in this suit. The counsel employed by the Hosiery Investigating Committee were powerless to act without the approval of the Committee. Each of the members of the Hosiery Investigating Committee had the right actively to participate in the defense of this suit. Each of the members of the Hosiery Investigating Committee contributed financially to the defense of this suit. (R. V. I, 15)

The Petitioners in their opening statement in the trial court said:

> "If the Defendant here infringes, we believe the whole seamless, elastic-top hosiery industry infringes. We make no secret of the fact that there are nearly 200 hosiery mills that have joined here in supporting this defense." (R. V. II, 1-2)

In its opinion the District Court said:

> ". . . the patentees have been defied by a combination of 172 hosiery manufacturers who employ the inventions without the payment of royalties and who have combined together and pay the cost of the defense in this suit because their interests are alike and as might be expected every conceivable defense has been presented with great skill." (R. V. I, 55-56)

If the mills in control of the defense are not interested along with Petitioners, not represented by the same counsel and not exercising a right of appeal, why is this question raised here? The named Petitioners will not be affected by modification of the decrees. If the 164 mills should be eliminated from the decree it will still bind the named Petitioners with the same force and effect.

The decrees entered against Petitioners serve only to limit the rule of *res judicata* applicable to the members of the Hosiery Investigating Committee, and make it clear that the estoppel will not extend in a subsequent action to the question of infringement.

Both the opinions and decrees expressly reserve the right to establish an implied license wherever one may exist (R. V. I, 40, 53; V. III, 64). In support of their contentions, Petitioners (p. 16) cite the record (R. V. I, 130-131, 185-186). The first citation relates primarily to hosiery made by Adams-Millis for *Interwoven,* a *licensee,* and the second to machines acquired from Scott & Williams as to which under the opinions and decrees the purchaser is fully protected in his right to establish an implied license. Equitable defenses of others than the named defendants were advanced, considered, and on the facts found to be without merit (R. V. III, 64-65). Petitioners again err on the facts. The decree states:

> 22. As will appear by reference to the Court's findings of fact, which are incorporated herein, the defense of this case was conducted by the group of 167 persons, firms, and corporations comprising the group known as the Hosiery Investigating Committee, (said 167 persons, firms, and corporations being listed in Exhibit A, hereto attached, defense counsel having been jointly retained by said group, and said 167 members of the Hosiery Investigating Committee group shall be bound by this decree in all respects the same as the named defendant except that *those other than Baker-Cammack Hosiery Mills, Inc., and Baker-Mebane Hosiery Mills, Inc., are not hereby adjudged guilty of infringements and they and each of them are not and shall not be deprived by this decree of the separate defense of non-infringement.* (R. V. I, 41)

This recital, rather than being an onerous extension of the terms of the decree to members of the Hosiery Investigating Committee who openly espoused, participated in, and controlled the defense of the litigation, is in fact a safe-

guarding provision limiting in any subsequent action the availability to Respondent of the estoppel based on *res judicata* to issues exclusive of that of infringement. The courts below followed the salutary guidance of this court in *Lovejoy, et al.* v. *Murray,* 3 Wall. 1-19, 70 U. S. 129, 134.

In *Eagle Mfg. Co.* v. *Miller,* 41 F. 351, 357-8, later before this court as *Miller* v. *Eagle,* 151 U. S. 186, the lower court said:

> "Under the rule recognized in Lovejoy v. Murray, 3 Wall. 1, and Robbins v. Chicago, 4 Wall. 657, it is clear that the Mast & Co. Company will be as fully bound by the results of the present litigation as though the corporation was a party to the record; for it is made clear that it is the principal party in interest, being the manufacturer of the machines sold by defendants Miller, and bound by contract with them to protect them against the consequences of infringement. It has had notice of the pendency of the suit, and in fact has assumed the control and management of the defense; and therefore, under the doctrine of the cases just cited, the decree herein will in fact be binding upon the corporation. *No good reason is perceived why, by apt statement in the decree, it may not be made to appear upon the face of the decree that in fact the Mast & Co. Company is bound by the results reached in the progress of the litigation in which it has been actively engaged; for that, in effect, is only stating, in set phrase, the force which the decree would in fact have as against the corporation.*" (Emphasis ours.)

These cases were cited and followed in *Ocean Accident & Guarantee Corp., Ltd.* v. *Felgemaker, et al.* (C.C.A. 6), 143 F. (2d) 950, 952.

It was not essential to the binding force of the judgment to bring in those controlling the suit by supplemental bill or otherwise. *Van Kannel Revolving Door Co.* v. *Winton Hotel Co.,* 263 F. 988, 994.

The judgments herein are in strict conformity with the Restatement of the Law of Judgments, § 84.

Even assuming *arguendo* that the recitals in the decrees imposing limitations upon the estoppel incident to the rule of *res judicata* might better have been omitted, their inclusion is harmless error which should be disregarded within the purview of Rule 61 of the Federal Rules of Civil Procedure.

As so aptly said in *Eagle Mfg. Co.* v. *Miller, supra,* these recitals only state "in set phrase, the force which the decree would in fact have . . ." The inclusion of recitals in a judgment that state in set phrase the force thereof are not inconsistent with substantial justice. Thus even if Petitioners' contentions are accepted, they do not call for exercise of this court's power of supervision.

CONCLUSION.

Respondent submits that no occasion exists for granting the application for certiorari. No conflict of decision, either as to the specific subject matter or as to the pronouncement or application of the rules of law, and no unusual or new questions of law are presented. The Petitioners assert alleged errors of law only by assertions of fact not supported in the record and contrary to the concurring findings of the courts below.

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